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In the Supreme Court of the United States

OCTOBER TERM, 1984

T.H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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Respondent's argument in support of the decision of the court of appeals turns largely on the assertion that the regulation that respondent violated, 45 C.F.R. 116.17(d) (1972), was "aberrant," "discredited" (Br. in Opp. i), and disapproved by Congress as frustrating the objectives of Title I (Br. in Opp. 13).[1] If the court of appeals had agreed with this view, of course, it would have been unnecessary to consider the retroactivity of the 1978 Amendments. As respondent recognizes (Br. in Opp. 21 n. 12), the court could

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[1]The errors in respondent's strained construction of *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801), and *Bradley* v. *School Board*, 416 U.S. 696 (1974), are discussed in our petition (at 11-15). We note in addition that respondent fails to address our contention that, as a practical matter, it would be impossible to operate large scale audit programs like those required by Title I if the auditors had to reaudit old claims under the current provisions every time the statute or regulations are amended.

simply have declared the regulation invalid. But neither the court below, nor Congress in amending the statute, suggested that the regulation was not fully consistent with the pre-1978 statute.

It clearly was so. The Elementary and Secondary Education Act of 1965 provided for the disbursement of Title I funds to needy school districts to provide special services for educationally deprived children "in school attendance areas having high concentrations of children from low-income families" (20 U.S.C. (1976 ed.) 241e(a)(1)(A)). The Act also required that Title I programs had to be of "sufficient size, scope and quality to give reasonable promise of substantial progress toward meeting those needs" (20 U.S.C. (1976 ed.) 241e(a)(1)(B)). As respondent notes (Br. in Opp. 2), in this case the Newark school district received the correct amount of funds for the period in dispute. The problem addressed by 45 C.F.R. 116.17(d) (1972) was how the available funds should be distributed *within* that district. It was surely reasonable for the Secretary to conclude that the aim of Title I, to provide meaningful supplemental programs for the nation's most seriously educationally deprived children, would best be served by focusing limited funds on the poorest areas in each district, rather than by permitting wider disbursement of the funds in poorer districts, with the concomitant risk that the funds available, as so dispersed, would provide less meaningful assistance to any child.[2]

The difficult judgment concerning educational policies reflected in 45 C.F.R. 116.17(d) (1972) is precisely the kind that justifies reliance upon agency expertise, especially where Congress has delegated specific rulemaking authority

[2]Appropriations for Title I have never been sufficient to serve all eligible children. See H.R. Rep. 95-1137, 95th Cong., 2d Sess. 7 (1978).

to the agency. 20 U.S.C. (1976 ed.) 241e(a), 242(b).[3] It is no reflection on the reasonableness of this judgment that Congress, in light of the experience accumulated in the administration of the Act, decided (more than eleven years after promulgation of the regulation) that some modification of the statute was appropriate.[4] See also Lawyers' Comm. Am. Br. 9-12.

Respondent also contends (Br. in Opp. 17 n. 9) that 1 U.S.C. 109, the general savings clause, does not apply to save liabilities incurred under regulations adopted pursuant to statutes that subsequently were amended, rather than directly under the statutes themselves. In support of this novel argument, respondent cites, out of context, dicta in *Rodgers* v. *United States*, 158 F.2d 835 (6th Cir.), rev'd, 332 U.S. 371 (1947).[5] But this Court has not hesitated to

[3]As this Court explained in *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977) (citation and footnote omitted), when specific rulemaking authority is delegated to an agency, "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term[s]. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner."

[4]The regulation violated by respondent was promulgated in 1967 (32 Fed. Reg. 2742). It was revised in 1976 to allow local educational agencies to designate all school attendance areas with a low income factor of at least 30% to be eligible for Title I services under certain circumstances (45 C.F.R. 116a.20(b)(2) (1976)). Congress did not alter the agency's policy judgment entirely when it amended the Act in 1978. Instead, it simply modified that judgment by reducing the 30% figure to 25% under certain circumstances. Thus, rather than a rejection of the earlier agency regulations, the new legislation represented a fine tuning of the statute in light of the experience gained under those regulations.

[5]In *Rodgers*, penalties were imposed on defendant for marketing cotton in excess of the quotas established by regulations of the Secretary of Agriculture for 1940-1942. The court of appeals rejected defendant's argument that the Secretary's decision not to impose quotas for 1943 and subsequent years precluded collection of the penalties for the

apply the general savings clause to preserve liabilities incurred under regulations issued pursuant to expired statutes. See *United States* v. *Palletz*, 330 U.S. 812 (1946) (reversing, on authority (inter alia) of general savings clause, judgments dismissing prosecutions for violations of regulations issued under Emergency Price Control Act of 1942, after expiration thereof); *United States* v. *Wheelbarger*, 331 U.S. 791 (same; see 71 F. Supp. 52 (D. Ore. 1947)). Cf. *United States* v. *Fortier*, 342 U.S. 160, 161 n. 2 (1951) (distinguishing situation where alleged violation did not occur until after expiration of regulation); *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386 (1953) (applying general savings clause to preserve liability under insurance policy issued pursuant to expired statute). It is clear, despite respondent's contrary claim (Br. in Opp. 17 n.9), that the plain language of the general savings clause, preserving "liability incurred under [an expired] statute" includes a liability that is incurred under a regulation validly issued pursuant to the statute. Such a liability is no less "incurred under" the statute than it is under the regulation. See *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). Cf. *United States* v. *Williams*, 8 Mont. 85, 19 P. 288 (1888).

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earlier years. Although reaching the same result as that required by the general savings clause, the court disavowed reliance on it, in the passage quoted by respondent. The court went on to distinguish the situation before it, where the statute remained unaltered and the administrator charged with implementing its policies amended the regulation to reflect changing circumstances, from the situation where the statute itself is altered so that the agency's power to enforce the regulation prospectively is "terminated by controlling action from the very source of power which permitted it to be enacted and enforced" (158 F.2d at 837). The court thus strongly implied that the general savings clause would apply in the latter case, which is the one involved here. This Court reversed the court of appeals' award of interest on the penalties due (332 U.S. 371 (1947)).

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

SEPTEMBER 1984

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